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IN THE

Supreme Court of the United States

October Term, 1962

No. 650

ANTHONY CHUPKA, WILLIAM FREELY, WILLIAM McNALLY and CHARLES SCHLOSSER,
Appellants,

against

LORENZ SCHNEIDER CO. INC. and JOHN STRAUSS, as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802,
Appellees.

In the Matter of the Arbitration

between

WILLIAM FREELY, ANTHONY CHUPKA, WILLIAM McNALLY and CHARLES SCHLOSSER,
Appellants,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 802, and LORENZ-SCHNEIDER CO. INC.,
Appellees.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves: (a) to dismiss the appeal herein on the ground that a substantial federal question is not presented and that the judgment appealed from rests on an adequate non-federal basis, or, in the alternative, (b) to affirm the final judgment of the Court of Appeals of New York State on the ground that the question presented is so unsubstantial as not to need further argument.

Statement

Lorenz-Schneider Co., Inc. (the "Employer") and Local 802, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") are parties to a collective bargaining agreement executed on October 5, 1959, for a term of four years ending October 4, 1963 (650)*. This agreement governs the wages, hours and working conditions of route salesmen employed by the Employer (602). These employees are engaged in the distribution to retail storekeepers of products merchandised by the Employer, including potato chips and similar snack items (676).

The subject matter of the collective bargaining agreement is the sales routes operated by these route salesmen. Indeed, a route is a job under the agreement (597).

Commencing in May, 1960, the Employer wrongfully eliminated four of the jobs covered by the collective bargaining agreement by purporting to transfer four sales routes to four individuals as independent entrepreneurs. These four individuals had, until that time, been Union members employed by the Employer as route salesmen under the collective bargaining agreement between the Employer and the Union (678). These four individuals, Chupka, Freely, McNally and Schlosser by name, are the appellants herein ("Individuals").

The collective bargaining agreement contains an undertaking by the Employer that "he will not enter into any agreement with any employee, verbally or in writing, which may be inconsistent or in conflict with this agreement * * *" (644). The agreement provides that a route may be eliminated only if it is shown that the volume of sales on the route has become uneconomic over a period of three

* Numbers in parentheses refer to folios of the printed record on appeal, unless otherwise indicated.

months (648). Neither the Employer nor the individuals claimed that the four routes in question had become uneconomic prior to the challenged transaction. (579, 596).

The Employer disposed of these four jobs by means of agreements of conditional sale which it executed with each of the Individuals (351, 395, 437, 485). No provision of these agreements purports to convey an exclusive right to sell to specified customers, or in a specified territory. Actually transferred by these agreements of conditional sale was the job of delivery of the Employer's product to a fixed number of storekeepers in a given territory (351, 395, 437, 485). The four agreements of conditional sale are substantially identical. They provide that the Individuals may sell to storekeepers only the products furnished by the Employer (352, 396, 438, 485). Under these agreements, the Individuals are required to service each of these customers at least twice a week (354, 398, 441, 488). Display racks and stands are to be sold to the Individuals by the Employer (358, 402, 445, 492). The Individuals must purchase all stock from the Employer, and they may sell to each customer only those items authorized for sale by the Employer (355, 399, 441, 489). By entering into these agreements the Individuals have agreed to abide by an undisclosed set of rules and regulations promulgated by the Employer to govern the details of the work performed. They must observe these rules and regulations which, according to express provision of the contract, survive the closing (356, 400, 443, 490).

Each of the Individuals must, pursuant to these conditional sales agreements, place their names on trucks and on sales tickets where designated by the Employer (357, 402, 444, 491). Furthermore, each agreement expressly provides that in the event that the Employer recoups these routes, current rates for repurchase will apply (359, 403, 446, 493).

Finally, no title to these jobs or sales routes has yet vested in Chupka, Freely, McNally or Schlosser, and title will not vest in them until May, 1967, or, in Freely's case, September 1964 (361, 405, 449, 495) and then only if the specified installments have been paid.

Thus, the tasks which were formerly done by the four Individuals as employees are still being performed by them. The only major change is that they now perform the work not as employees governed by the collective bargaining agreement, but rather as parties to individual conditional sales agreements with the Employer. The merchandise is the same, the customers are the same, and the Individuals are the same (584).

Shortly after these transfers took place, the Union advised the Employer of its objections, on the grounds that the transfer of jobs or sales routes under such circumstances was prohibited by the collective bargaining agreement. Unable to resolve this matter amicably, the parties followed the grievance procedures set forth in the collective bargaining agreement and ultimately proceeded to arbitration (679). The Employer and the Union agreed upon (1) the selection of an arbitrator, and (2) the issue to be submitted to the arbitrator for decision (503). Protracted arbitration hearings followed on several dates, with both parties represented by counsel (679). The Individuals were not parties to the arbitration proceedings.

The Employer and the Union jointly framed the issue for the arbitrator (503). The issue submitted for arbitration was:

> "Were the Company's sales of routes, to William Freely, Anthony Chupka, William McNally and Charles Schlosser in violation of the contract between the parties? If so, what shall be the remedy?" (503).

The arbitrator issued his award on February 28, 1961 (680). In his award, he responded to the submission by finding that the transfer of these jobs or sales routes by the Employer to the Individuals did, in fact, violate the collective bargaining agreement. As the remedy, he directed the restoration of these routes to the coverage of the collective bargaining agreement from which they had been wrongfully removed. The arbitrator's award states:

> "The Company's sales of routes to William Freely, Anthony Chupka, William McNally and Charles Schlosser were in violation of the agreement between the parties. These routes shall be returned to the coverage of the agreement to be served by route salesmen, within the scope of Article 1(A) of the parties' agreement." (571-73).

The collective bargaining agreement provides that an arbitrator's award shall be final and binding upon the Employer and the Union (636).

Following the issuance of this award, the litigation which has led to the appeals now before this Court was commenced.

For ease of reference, it is necessary to distinguish between the two cases which are the subject of this appeal. The case captioned

> "In the Matter of the Arbitration
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> Between
>
> Lorenz-Schneider Co., Inc. and William Freely, Anthony Chupka, William McNally, and Charles Schlosser,
>
> Petitioners,
>
> and
>
> International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802,
>
> Respondent."

is a special proceeding brought pursuant to Section 1462 of the Civil Practice Act of the State of New York by the

Employer and the Individuals, seeking an order vacating the arbitrator's award. In this special proceeding, the Union cross-moved for an order and judgment confirming the arbitrator's award. This special proceeding shall henceforth be referred to as the "Arbitration Proceeding".

Following a decision by the Appellate Division of the Supreme Court of the State of New York, Second Department, holding that the Individuals had no standing to apply for the relief sought in the Arbitration Proceeding, the Individuals commenced a new and separate action in the Supreme Court of the State of New York for an injunction and declaratory judgment. In the latter action, both the Employer and the Union were party defendants.* By this action, the Individuals sought a judgment declaring that the arbitration award and the judgment confirming it were not binding upon them, and restraining the Employer and the Union from (1) enforcing the award and judgment against the Individuals, and (2) interfering with the operation of these jobs or sales routes by these Individuals. This action is captioned

"Anthony Chupka, William Freely, William McNally and Charles Schlosser,

Plaintiffs,

against

Lorenz Schneider Co., Inc., and John Strauss, as President of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 802,

Defendants."

and will hereinafter be referred to as the "Injunction Action". Each of the foregoing matters will be considered in greater detail below.

* In the Injunction Action, the defendant Employer fully supported the position of the plaintiff Individuals, and indeed joined with them in several applications for various relief against the defendant Union. (33, 209-13).

The Arbitration Proceeding

By notice of motion dated March 16, 1961, the Employer and the Individuals jointly commenced the Arbitration Proceeding by moving the Supreme Court of the State of New York, Queens County for an order vacating the award of the arbitrator (675). That relief was denied, and the Union's cross-motion for an order confirming the award and for judgment thereupon was granted (675). A judgment confirming the arbitration award and incorporating the arbitrator's mandate of specific performance was entered on June 5, 1961 (717).* The text of this judgment is found in the printed record at folios 310-15.

The Employer and the Individuals jointly appealed from this decision to the Appellate Division of the Supreme Court, Second Department. By order dated November 27, 1961, that Court unanimously affirmed (715-17). The Appellate Division also determined that the Individuals had no standing to move to vacate the arbitrator's award since they were not parties to the collective bargaining agreement or to the arbitration (717). In its opinion, the Appellate Division declared that it was not passing upon the points urged solely on behalf of the Individuals (717).

From the adverse decision of the Appellate Division, the Employer applied to the Court of Appeals of the State of New York for leave to appeal to that Court. Leave to appeal was denied on May 17, 1962 (828). The Individuals

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* The Employer's violations of its agreement with the Union began in the Spring of 1960 (678). To date, although every tribunal which has ruled upon the matter has found in the Union's favor, enforcement of the judgment confirming the arbitrator's award has been impossible because of a succession of interlocutory stays secured by the Employer and/or the Individuals. Since the collective bargaining agreement expires on October 4, 1963, the Union will be wholly denied the benefit of an ultimate decision in its favor if the Individuals and the Employer succeed in delaying enforcement of the judgment beyond that date.

appealed directly to the Court of Appeals thereafter, and their appeal was dismissed upon the Union's motion, on the ground that no substantial constitutional question was presented (808). Following the dismissal of their appeal by the Court of Appeals, the Individuals appealed directly to this Court.

The Injunction Action

By complaint and order to show cause dated December 11, 1961 (shortly after the Appellate Division, had, on November 27, 1961, determined that the Individuals had no standing to move to vacate the award) the Individuals commenced the Injunction Action against the Employer and the Union, asking for a judgment (1) declaring that the arbitration award and the judgment confirming it were void as to them and (2) enjoining the Employer and the Union from enforcing the award against them and from interfering with their operation of the jobs or sales routes (109-10). Following the denial by the Supreme Court of a motion by the Individuals for a temporary injunction (22-29), that Court partially granted the Union's motion for summary judgment by dismissing the complaint insofar as it sought injunctive relief, while at the same time granting judgment to the Individuals to the extent of declaring that they were not personally bound by the judgment issued in the Arbitration Proceeding. In the exercise of its discretion, the Court held that the equities did not warrant the granting of injunctive relief in favor of the Individuals because the effect of such relief would be to nullify the judgment rendered in favor of the Union, and would permit the Employer to continue in the breach of its contract with the Union (269, 272). The Court held, however, that the Individuals were not without an adequate remedy in the form of an action for damages against the Employer. Leave to bring suit for damages was granted (273-75).

The Individuals appealed to the Appellate Division of the State of New York, Second Department, from both the order denying a temporary injunction and the order dismissing their complaint for permanent injunctive relief. On June 11, 1962, the Appellate Division unanimously affirmed each of the orders appealed from, without opinion (718-20). An appeal taken directly by the Individuals to the Court of Appeals of the State of New York from the foregoing determination by the Appellate Division was dismissed by that Court on October 25, 1962, upon the sented (808). Following the dismissal of that appeal, the Individuals appealed directly to this Court.

ARGUMENT

POINT I

The appeal in the arbitration case presents no substantial federal question.

A. No substantial federal question is raised by the absence of the Individuals from the proceedings before the arbitrator.

No federal question is raised by the absence of the Individuals from the arbitration proceeding itself. The arbitration was held pursuant to the provision in the contract between the Union and the Employer under which only controversies between the parties to the agreement are arbitrable (636). The Union and the Employer submitted to arbitration a dispute between them concerning the interpretation of their contract (578). The Individuals were not parties to the agreement, and any dispute which they may have had with either party to the agreement was independent of and not arbitrable under that agreement. Grievances of the Individuals are justiciable elsewhere than in a contractual arbitration proceeding between the Employer and the Union. This Court has said that:

> "• • • arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582.)

The arbitration provisions of the agreement certainly do not make controversies with strangers arbitrable thereunder. Nor can it be said that a stranger has a constitutional right to be heard on the interpretation of a contract between the two contracting parties, before a tribunal established by the contracting parties for their own business purposes. In the *Warrior* case, *supra*, this Court, quoting with approval from *Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016, stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." (363 U. S. at 581.)

This is not to say that the stranger is without a remedy for the infringement of such rights as he may possess. There remains available to him in an appropriate case a judicial remedy for such infringement.

A stranger's right to be heard on the issue of the remedy to be awarded by the arbitrator is no greater than his right to be heard with respect to the interpretation of the parties' agreement. The formulation of a remedy is no less within the exclusive realm of the arbitrator than the interpretation of the contract itself. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597, Mr. Justice Douglas stated for the majority of this Court:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."

The issue jointly submitted by the parties to the arbitrator required him to determine whether the collective bargaining agreement was violated by the Employer's removal of four route salesmen's jobs from its coverage, and, if so, what remedy should be awarded. The arbitrator found that the Employer had indeed violated the agreement. As a remedy, the award directed the restoration of these four jobs to the coverage of the agreement. No remedy, it is submitted, could be more appropriate under the circumstances. No federal question is raised by a stranger's assertion of the right to be heard on the remedy to be awarded in a contractual arbitration proceeding as between the two contracting parties.

The individuals had no right, federal or otherwise, to be heard by the arbitrator. To the extent that they had assumed the status of independent businessmen as of the time the arbitration hearings were held, they were plainly beyond the coverage of the arbitration provisions of the agreement. To the extent that they might have wished, at that time, to continue to be treated as members of the Union, they were bound by the conduct of the arbitration by the Union as their duly designated collective bargaining representative. To the extent that they might have wished at that time to be heard to argue that they were innocent victims of the Employer's wrongdoing and should not be made to suffer as a result, they admittedly remained free, as the Courts below have repeatedly acknowledged, to assert a claim for damages against the Employer.

In any event, under no body of law does a stranger's claim that he is an innocent victim of the violation of a contract to which he is not a party require the injured party to the contract to surrender his contractual remedy of arbitration. While the good faith and innocence of the Individuals is open to serious doubt,* these considerations were in fact irrelevant to the arbitration proceedings. Strangers are properly denied the right to intervene as parties to labor arbitration cases, especially where such intervention would frustrate the objectives intended to be accomplished by the agreement to arbitrate.

B. No substantial federal question is raised by the absence of the Individuals from the judicial proceedings in which the vacatur of the arbitration award was sought.

In *Matter of Soto*, 7 N. Y. 2d 397, 399, 165 N. E. 2d 855, the highest court of the State of New York held that discharged employees had no standing to move to vacate an award upholding their discharge, which was rendered in an arbitration proceeding between their employer and their union. The Court stated:

> "The award, having been rendered in a controversy between the parties to a valid collective agreement, could be vacated only at the initiation of a party to the arbitration in the manner and for the reasons provided by section 1462 of the Civil Practice Act."

It was the *Soto* principle which was applied by the Courts of the State of New York when they rejected the arguments of the Individuals in the instant case.

No substantial federal question is raised by the Individuals' claim that the Courts of the State of New York

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* Godfrey P. Schmidt, Esq., attorney for the Employer, also represented the Individuals in their application for an order vacating the arbitration award (500). Thereafter, representation of the Individuals was transferred to Kalman I. Nulman, Esq., an attorney with whom Mr. Schmidt shares his offices (20, 21).

erred in denying to them standing to vacate the arbitrator's award.* This is true for essentially the same reasons that they were not entitled to be joined in the arbitration proceeding itself.

In Court, the Individuals might wish to argue that the arbitrator erred in interpreting the agreement as he did, or that he awarded the wrong remedy. But such considerations are not appropriately argued to a court. In this respect, Section 1462 of the Civil Practice Act, as well as the decisions of this Court and of the New York Court of Appeals forbid reviewing courts to substitute their judgment on the merits, or concerning the remedy awarded, for that of the arbitrator.

> *United Steelworkers of America* v. *Enterprise Wheel & Car Co.*, 363 U. S. 593, 596;
> *Matter of Wilkins*, 169 N. Y. 494, 496, 62 N. E. 575;
> *Dembitzer* v. *Gutchen*, 3 N. Y. 2d 851, 144 N. E. 2d 728.

If it is the claim of the Individuals that their constitutional rights are infringed by the application to them of the principle that Courts may not review the arbitrator's exercise of judgment, then important principles governing labor arbitration recently announced by this Court demonstrate the lack of merit in such a claim. This Court, in the *Enterprise Wheel* case, *supra*, stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (363 U. S. at 596.)

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* Indeed, the Individuals were parties to and were in fact fully heard in the proceeding in which the judgment confirming the award was entered. It was not until the decision on appeal that they were found to have no standing to move to vacate the award.

If the Individuals are here claiming that substantial federal rights were violated insofar as the decisions below hold that they had no right to show, in the statutory proceeding to vacate the award, that they were innocent injured parties, or that they were improperly excluded from the arbitration itself, such claims are equally without merit. Such claims could succeed only if the Individuals could establish independently that their innocence or their asserted rights entitle them to joinder as parties to the arbitration proceeding itself. As shown above, however, the contractually private nature of the arbitration between Employer and Union, together with the irrelevance of the innocence or guilt of the Individuals as considerations for the arbitrator, required the New York Courts to reject their attempt to join in the motion to vacate.

Finally, if the Individuals claim a substantial federal right to argue in Court that the award in an arbitration to which they were not parties should be set aside as invalid for the reasons listed in Section 1462 of the Civil Practice Act,* that claim must also fail. The Employer has, in the

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* Section 1462 of the Civil Practice Act of the State of New York provides:

"Motion to vacate award. In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated.

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4. Where the arbitrators, or other persons making the award exceeded their powers, or so imperfectly executed them, that a

instant case, proceeded through the courts of New York, up to and including the Court of Appeals, upon his claim that the arbitration award is invalid under Section 1462. Every court to which the Employer has applied has rejected this contention on its merits. Must the Courts hear the same challenge again, and from a stranger who supposes himself damaged by the award, but who is neither a party to the collective bargaining agreement, the arbitration proceeding, nor the dispute over contract interpretation? Must the State Courts, as a matter of substantial federal rights, hear attacks by strangers upon arbitration awards which resolve private business controversies? May strangers attack an award which satisfies the parties to the arbitration? Is any limit to be placed upon the number of strangers who may attack the award?

Obviously, chaos would be introduced into collective bargaining unless arbitration is preserved as a speedy and effective method of finally resolving controversies between parties to a collective bargaining agreement. And the exclusion of strangers from such controversies is grounded

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mutual, final and definite award upon the subject-matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight.

Where an award is vacated, the court, in its discretion, may direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements may be awarded to the prevailing party; and the payment thereof may be enforced in like manner as the payment of costs upon a motion in an action."

upon the desire to preserve the efficacy of this salutary procedure, and upon the recognition that strangers may, in court, exact a judicial remedy for any violation of their rights.

None of the claims which the Individuals sought to assert in the proceeding to vacate the award were justiciable in such a proceeding. No other claims have been advanced by the Individuals in support of the substantial federal right which they assert on the first of these two appeals. They have thus established no right, federal or otherwise, sufficient to justify an appeal to this Court.

POINT II

The appeal in the injunction case presents no substantial federal question.

A. No substantial federal question is raised by the decisions of the New York State Courts holding that the Individuals are not entitled to an injunction restraining the enforcement of the judgment confirming the arbitration award.

The action to restrain the enforcement of the judgment confirming the arbitration award is, on its face, a collateral attack upon the validity of that judgment by persons in privity of contract with a party to the proceedings in which the judgment was rendered.

The judgment confirming the arbitration award was affirmed by the Appellate Division (715-17). The Court of Appeals, upon two separate occasions, has refused to review the decision of the Appellate Division (823, 828). Under these circumstances, the judgment confirming the award is not susceptible to collateral attack either by the parties to the action in which it was rendered, or by other interested persons who were not parties.

Bryan v. Kennett, 113 U. S. 179, 198;
In re Lennon, 166 U. S. 548, 553;
Johnson v. Muelberger, 340 U. S. 581;
Conkey v. Russell, 111 Fed. 417, 421.

See also

Donato v. American Locomotive Co., 283 App. Div. 410, 127 N. Y. S. 2d 709, affirmed 306 N. Y. 966, 120 N. E. 2d 227;
Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755;
Martocello v. Martocello, 197 Ga. 629, 30 S. E. 2d 108;
Brokaw v. Brokaw, 99 Ind. App. 385, 192 N. E. 728;
Suiter v. Suiter, 77 Ohio App. 44, 57 N. E. 2d 616.

In *Donato v. American Locomotive Co., supra*, the Court observed that

> "If every person who had interest in an arbitration proceeding to which he was not a party had the right to attack it by a plenary suit in equity, the situation would be a chaotic one." (127 N. Y. S. 2d at 713).

B. No substantial federal question is raised by the decisions of the New York State Courts holding that the Individuals' rights can be fully preserved by an action for damages against the Employer.

The Individuals argue that a substantial federal question is raised by that portion of the decision below which states:

> "To grant the plaintiffs the drastic equitable relief they seek in this action would effectively deprive the union of its remedy and permit the continuance of the breach of contract by the employer. That does not mean, however, that the plaintiffs are remediless. Again, as observed by the justice who passed upon the award: 'The arbitrator's award did not affect any recourse the four independent contractors [the present plaintiffs] may have against the corporation [employer] based on their contracts with it.'
>
> "The irreparable harm relied upon by the plaintiffs in this action as the basis for obtaining equitable relief is that 'if deprived of their routes, plaintiffs may never again have the opportunity of engaging

in business for themselves and will sustain great financial loss in addition not compensable by damages because of the difficulty of ascertaining and computing such damages' (complaint, par. 14). Whether plaintiffs may again have the opportunity of engaging in business for themselves is highly speculative. Damages compensable by the employer, however, can readily be ascertained inasmuch as the monetary value of the routes improperly transferred can be computed.

"Plaintiffs having failed to plead any cause of action of damages and since, for the reasons noted, they are not entitled to equitable relief this court cannot, in the present state of the pleadings, grant them money damages notwithstanding that all necessary parties are before the court. * * *" (272-275)

Since the arbitrator's judgment on the issue submitted is not judicially reviewable, it is established that the Union has suffered injury as a result of the Employer's wrongdoing. Even if it is assumed *arguendo* that the Individuals have also been wronged by the Employer, and may be damaged by the manner in which the Employer elects to satisfy its duty to comply with the award, the court below properly limited the Individuals to their damage remedy against the Employer. Such a judicial limitation raises no substantial federal question.

Obviously, two parties successively wronged by a single wrongdoer cannot each obtain specific performance. In the presence of such conflicting claims for specific performance, courts apply the equitable maxim that the claim prior in time is superior in right.

Louisiana v. *Mississippi*, 202 U. S. 1;
Commercial National Bank v. *Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520;
Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U. S. 182;
Niles v. *Mathusa*, 162 N. Y. 546, 57 N. E. 184;

Central Trust Co. of New York v. *West India Imp. Co.*, 169 N. Y. 314, 323, 62 N. E. 387, 390;
Bispham's *Principles of Equity*, § 45 (8th ed. 1908).
Pomeroy's Equity Jurisprudence, §§ 413-15 (5th ed. 1941);
19 Am. Jur. *Equity*, § 486 (1938);
30 C. J. S. *Equity*, § 111 (1950);

Application of this principle to the Individuals' claims in this case is especially appropriate. Any separate agreements made by them with the Employer concerning route salesmen's jobs were necessarily subject and subordinate to the collective bargaining agreement itself. Transferees such as the Individuals normally take property subject to rights which obtained while the subject matter was in the hands of the transferor (Restatement, Judgments, § 115, note 1(d) (1938)). The Individuals, all formerly employees working under the collective agreement and aware of its terms, made their separate arrangements with the Employer concerning the subject matter of the collective agreement at their peril. The Individuals made their individual agreements with at least constructive notice that such arrangements transgressed the collective agreement.

The Individuals are not deserving of specific performance as a matter of basic equitable principles. A fixed dollar price was agreed upon as the price for the property which they claim to have purchased from the Employer. (360, 404, 448, 495). If such property had an ascertainable market value in dollars at the time the transactions occurred, the value of such property together with any subsequent accretions is necessarily susceptible of computation by the same means now. As the Court below found,

> "Damages compensable by the employer, however, can readily be ascertained inasmuch as the monetary value of the routes improperly transferred can be computed." (274).

The grant or denial of equitable remedies such as an injunction or a decree of specific performance, far from presenting a substantial federal question, has always been recognized as a matter within the sound discretion of the trial court.

> "Equity is rooted in conscience. An injunction is, as it always has been, 'an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion.'" *Hurd* v. *Hodge*, 334 U. S. 24, (1948) (concurring opinion of Frankfurter, J.) See also *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334 (1933) (Brandeis, J.)

The discretion of a court of equity traditionally is not exercised to provide equitable relief where, as in the instant case, the legal remedy of damages is adequate. *Harrisonville* v. *Dickey Clay Co., supra;* Pomeroy's *Equity Jurisprudence*, §1338 (5 ed., 1941); *cf. White* v. *Sparkill Realty Co.*, 280 U. S. 500 (1930).

The exercise of discretion by a Court on the basis of its examination of the equities of the respective parties does not raise a federal question. The Court of Appeals of the State of New York, following its examination of the facts, dismissed both of these appeals upon the ground that no substantial constitutional question is involved. This Court should do the same.

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeals herein on the ground that a substantial federal question is not presented and that the judgment appealed from rests on an adequate non-federal basis, or, in the alternative, should affirm the final judgment of the Court of Appeals of New York State on the ground that the question presented is so insubstantial as not to need further argument.

Respectfully submitted,

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